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Title Insurance and Adverse Possession

I. Introduction

Title insurance is a phenomenon that Europeans are not familiar with, because it is a specific characteristic of American property law. It is a commonly used tool in the real estate industry, designed to complement the errors and omissions made by the conveyancer through the conveyancing process.[1] The main explanation for the development of title insurance is to be found in the land registry system of the United States or it would be more appropriate to say, the lack of state owned land registry systems. In the U.S. the Torrens system of land, meaning that a register of land holdings is maintained by the state that guarantees an indefeasible title to those included in the register, did not become inherent to the legal culture, contrary to other common law countries such as Australia and New Zealand, mainly the Commonwealth Nations.

For European citizens it may be difficult to imagine that insurance firms can maintain private title plants, re-indexed copies of the public records, substituting the land registries.

The purpose of this thesis is, through providing a comprehensive and overall summary on title insurance, to provide the basis for the examination of the correlation between title insurance and adverse possession, in order to reveal how the two legal institutions relate and to discover the interfaces, if any, they have and to draw the consequences.

I intend to make the reader familiar with the title insurance system by providing insight into the historical aspect and the reasons behind the development of the legal instrument and the main characteristics of it. I intend to

(i) give a general definition and clarification of the parties involved,
(ii) give the basics about policies and the costs involved and
(iii) describe title plants.

I undertake to present the correlation between title insurance and adverse possession;

(i) first I examine of the effect the risks covered in a policy have on adverse possession and vice versa,

[1] Arruñada, Benito, A *Transaction-Cost View of Title Insurance and its Role in Different Legal Systems.* (The Geneva Papers of Risk and Insurance, 27: 4, 2002.) pp 582–601.
http://www.econ.upf.edu/docs/papers/downloads/565.pdf (accessed February 22, 2010)

(ii) second, the overlapping period between the statutory terms required for obtaining title by adverse possession and the coverage that title insurance provides,
(iii) third, the way a title obtained by adverse possession enters the public records and
(iv) fourth, how 'marketable title acts' relate to title insurance and adverse possession, and how they complement them.

II. Title insurance

1. Title insurance in general

Title insurance is an insurance policy in which the insurer insures the policyholder against future losses stemming from a defective title, but only if the defect already existed at the time of the issuance of the policy. The insurer undertakes to provide legal defense if the insured title is challenged and to provide indemnification if a loss occurs.

In order for the reader to more easily understand the nature of title insurance, I deem useful the clarification of the below terms such as

(i) title;
(ii) insurance; and
(iii) title assurance.

2. Some basic definitions

What is title?

„Title is a set of intangible, legally enforceable rights relating to a specific parcel of land."[2] In everyday parlance we might often say 'we have some land', but in the legal terminology it would be inaccurate, instead we should say 'we have title to that land' as we never have the land itself, we can only have title to it. *„Title means the right to an interest in real estate, including the interest of an owner, lessee, possessor, lienor, holder of a security interest, and beneficiary of a restriction including an owner of an easement,"* as the Uniform Marketable Title Act (1990)[3] defines.

What is insurance?

A very general definition that, in my opinion, covers the whole concept is the following: *„A contract whereby, for specified consideration, one party undertakes to compensate the other for a loss relating to a particular subject as a result of the occurrence of designated hazards."*[4]

Later in this thesis I make a comparison between general property insurance and title insurance where I explain the differences and the specific characteristics of them.

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[2] Sprankling, John G., *Understanding Property Law*, (Lexis-Nexis Publishing, 2000) p 414.
[3] Section 1 of Definitions in the Uniform Marketable Title Act (1990), Drafted by the National Conference of Commissioners on Uniform State Laws (recommended for enactment in all States).
[4] http://legal-dictionary.thefreedictionary.com/insurance

What is title assurance?

Title insurance as a specific type of insurance is the part of a bigger system, which is title assurance. Title assurance is a more general term and means all methods and tools supporting the marketability of land or real property. Marketability is a key factor in real property sales as it determines the fate of land in the market. Many aspects determine marketability, e.g. location, zoning, environmental aspects and, most importantly for us, whether it has clear title or not.

In standard real estate purchase agreements it is a requirement for the seller to convey marketable title to the buyer. A marketable record title means that the seller must prove an unbroken chain of title back to a root of title, which is a deed or other instrument that created or transferred title. It must be noted that in some 18 states (in the U.S.) the unbroken chain of title must be proven only for the last twenty-forty years as a result of Marketable Title Acts and in those states the title is free from all interests and rights recorded before the root of title.[5] (I discuss the effect of Marketable Title Acts on adverse possession and title insurance below.)

The other methods used for title assurance are

(i) covenants of title in deeds and
(ii) title opinions and abstracts.[6]

These methods are not sufficient enough on their own, but can complement title insurance.

(i) Covenants – which are promises *made expressly by the seller in the deed* - are still broadly used, but are a lot less effective compared to title insurance as we can see in detail later. Title insurance makes the enforcement of claim easier and less costly as the insurance company carries the burdens of litigation. It is an important characteristic of title insurance as unpredictable litigation costs might keep buyers from enforcement of their rights. In addition, even if they succeed to enforce their rights, the seller might not be solvent so the execution of the award still might remain questionable.
(ii) Title opinions are produced by attorneys. They include the opinion on the state of title based on the public records as well as on other regulations, ordinances, such as tax and housing regulations and the like. If the opinion is negligently prepared, the buyer has the right to sue the attorney for malpractice.[7] Abstracts are the counterparts of title opinions and are prepared by non-lawyers abstractors. Title opinions and abstracts are not the same, but are similar, though.
(iii) In my opinion there is a third legal doctrine that is deemed a tool for assurance of title that is the doctrine of adverse possession or sometimes called title by prescription. It generally protects the person *„who possesses the land under a*

[5] Op.cit note 2 p 409.
[6] Ibid. p 414.
[7] Ibid pp 423–424.

belief of ownership".[8] Below I discuss the relation between title insurance and adverse possession in detail, but it seems appropriate to clarify that only long-term adverse possession provides additional title assurance, short-term does not.

Definition of title insurance

Title insurance means a type of insurance, a policy in which the insurer insures the holder against future losses in case of a defective title, but only for title defects already existing at the time of the issuance of the policy, not for losses stemming from defects that arose after the date of policy. The defect itself may be discovered after the issuance of the policy (if it is discovered before that, the insurer will most likely exclude it from the coverage of the policy.), but the defect must be present when the policy is issued. The insurance company undertakes the defense of title at court meaning it bears the costs of litigation and undertakes to indemnify the policyholder in case a loss occurs relating to the defective title.

3. Characteristics of title insurance

Title insurance is an insurance

(i) between the insurer and the policyholder
(ii) for covering future losses in case of a defective title, that already existed at the date of the policy
(iii) in which the insurer indemnifies or otherwise compensates the holder and/or legally defends the title irrespective of the existence of negligence.

Parties

The parties in this legal relation are the policyholder and the insurer and in most cases the insurer is a title insurance company.

The policyholder can either be the buyer of the property or the lender in case a mortgage is involved. If the prospective buyer does not have all the consideration for the real property, and that is in most of the cases, he will resort to a loan. A loan becomes a mortgage if a lien is put on the property financed from the loan in order to secure it. *„A mortgage is the conveyance on an interest in real property as security for performance of an obligation."*[9]

In general, title insurance companies whose share of the market is the biggest (i.e. who issue the most policies) have the ability to provide title insurance. They either issue polices directly or through affiliated agents. Small towns' banks also provide title insurance services.

[8] Backman, James H., *The Law of Practical Location of Boundaries and the Need for Adverse Possession Remedy* (Brigham Young University, Law Review 1986) p 958.
[9] Restatement (Third) of Property Mortgages (1997)

Other participants in the industry who do not issue policies

(i) Abstractors: non-lawyers who conduct title search examining records, documents. The final product of their work is a summary, a report regarding the title of the property.
(ii) Lawyers: they prepare title opinions.

Both abstractors and lawyers are liable for negligence. Attorneys use the assistance of an abstractor sometimes for time saving purposes and base their title opinion on the abstract provided by the abstractor.

Liability of professionals

Negligence is a crucial part of other title assurance methods. As mentioned above, title insurance companies' liability is irrespective of negligence, strict liability applies to them, while attorneys or abstractors are liable for professional negligence. A prudent prospective buyer will consider the factor of liability in considering the methods of title assurance.

The *legal status* of the parties involved significantly differs regarding liability. Regarding professional liability, abstractors and lawyers are liable in tort for negligence in examination, while title insurance companies are not.[10] Regarding the liability they take on by issuing the policy for coverage as well, insurance companies are liable for a longer period of time, than the other conveyancers, as they are liable not only to the customer, but also to his heirs.[11] (According to Black's Law Dictionary *„a conveyancer is a lawyer, who specializes in real-estate transactions. In England, a conveyancer is a solicitor or licensed conveyancer who examines title to real estate, prepares deeds and mortgages, and performs other functions relating to the transfer of real property."*)

In a real estate purchase not only the buyer needs to be positive about the title but the lender, a bank has exactly the same incentive to secure. Thus if it comes to a foreclosure he will have the same coverage as the buyer has.

Policy types

The stated reasons lead to the following solution: in the course of a real property sale, in which mortgage is involved, two policies are being issued at the same time: the owner's policy and the lender's policy. So in practice when a mortgage is present the lender requires the borrower to obtain title insurance covering the lender and for an additional amount the borrower/buyer/owner can purchase the policy for himself.

(i) *The owner's policy* insures the buyer of real estate, the mortgagor. It equals to the purchase price, which does not change as time goes by. The only change possible is adjustment to inflation. It covers both the purchaser and his heirs in perpetuity. It also includes warranty insurance.

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[10] Roberts, E. F., *Title Insurance: State Regulation and the Public Perspective* (Indiana Law Journal, 1963) p 4. http://library2.lawschool.cornell.edu/hein/Roberts,%20E.F.%2039%20Ind.%20L.J.%201%201964.pdf (accessed: March 8, 2010)

[11] Arruñada, Benito. 2001. *A Global Perspective on Title Insurance.* (Housing Finance International, 16(2)), p 3. http://web.ebscohost.com/ehost/pdf?vid=2&hid=107&sid=956ffde9-10ec-4fd1-86af-908935c14cbd%40sessionmgr110 (accessed February 22, 2010)

(ii) *The lender's policy* covers up to the amount of the mortgage loan and the coverage is gradually being reduced as the pay-off goes and it expires altogether with the mortgage. (N.B.: that lender means mortgagee.)

Title insurance covers two types of real estate transactions, such as

(i) commercial; and
(ii) residential types.

If we combine the types of policies with the types of real estate transactions covered, we can conclude that the common types of insurance policies are provided for

(i) home owners
(ii) commercial property owners
(iii) residential mortgage lenders and
(iv) commercial mortgage lenders.[12]

Subject matter

Looking at the **sub***ject matter* of the insurance we can say that it covers any future loss that stems from a defective title, but only if it already existed at the date of the issuance of the policy and is not listed in Schedule B (Schedule B is a part of every insurance policy, stating the risks excluded from coverage). Losses from defects arising after the date of policy are not covered as a general rule. This means that the defect itself may be discovered after the policy issuance, but the defect must have been present at the time of the policy issuance in order to be covered by title insurance.

Compensation, indemnification

A very important characteristic of title insurance is the following: it indemnifies the policyholder against future losses and/or legally defends the title if necessary, irrespective of the existence of negligence committed during the examination of the title. As Sprankling argues[13]

„the insured buyer is entitled to recover for any actual loss that is proximately caused by the defect. This sum is usually measured by the lesser of (a) the amount needed to remove the defect from title or (b) the extent to which the defect reduces the fair market value of the land. The insured may also be able to recover foreseeable consequential damages (e.g., lost rental income, lost profits). [...] In no event, however, can the insured's recovery exceed the policy limit specified in the policy itself."

[12] Downes, Jon, *Title Insurance – A solution to fraud in the mortgage industry?* 2005 http://www.firsttitle.com.au (accessed February 22, 2010)
[13] Op.cit note 2 p 426.

4. Historical development

The main reason for the development of title insurance is to be found in the land registry system of the U.S. or it might be more appropriate to say that the lack of reliable, state-maintained land registry systems led to its development. In the U.S. the Torrens system of land registry, meaning that a register of land holdings is maintained by the state that guarantees an indefeasible title to those included in the register, did not become inherent to the legal culture, contrary to other common law countries such as Australia and New Zealand, mainly the Commonwealth Nations.

The development of title insurance began around the last third of the 19th century, when there were no state-owned land registries at all. The buyer carried the burden of the validity of a land title because the rule of *„caveat emptor"* (meaning: let the buyer beware) applied to land sales back then. If the buyer wished to have clear title to the land he could only rely on his own examination of the property and the statements of the conveyancer assigned, who generally was liable for negligence. If there was a title defect in the property the buyer was exposed to the threat of losing the property.

The birth of title insurance dates back to 1868, when the Pennsylvania Supreme Court faced a question considering the professional liability of a conveyancer. In *Watson v. Muirhead* the Court eased the degree of their liability by ruling that *„if the conveyancer makes a slip in spite of a proper degree of care, it is not negligence".*[14] The Court applied the *„reasonable standard of care"* formula, thus it became clear for lawyers that neither investors nor purchasers were protected against professional malpractice. The solution to the 'loophole' became title insurance, which complemented the process of title certification by lawyers with the element of insurance. The first policies were being issued in 1876.

The second expansion of title insurance took place after World War II as the secondary mortgage market started growing. Due to the securitization of mortgages, purchasers of securities demanded standard title guarantees. In order to make the secondary mortgage market more secure, the *„U.S. government has mandated title insurance a requirement of any mortgage lender selling mortgages through security pools".*[15]

The two main reasons for the expansion were the following:

(i) title guarantee for creditors/loaners
(ii) with the expansion of the secondary mortgage market.[16]

5. The Role of Title Insurance

Title Plants and Public Depositories

With the spread of title insurance the need for a state-maintained land register became even weaker. Title insurer companies started to build up their own **title plants** instead, in substitution for the public one.

[14] 57 Pa. 161
[15] Op.cit note 12.
[16] Op.cit note 11 p 4.

Title plants are the private counterparts of public land registries. They contain all relevant data and documents regarding land. Contrary to the public one, the copies of the public records are re-indexed, thus well-organized. Other advantages are that the records are updated and complemented on a daily basis, but have no legal effect contrary to the public land records. (Buyers must place a copy of the sale document in the public „record depositories.")

In contrast with title plants, public records are cumbersome to use, because the documents are organized along a grantor-grantee index (i.e. documents can be found under the names of the grantor or the grantee), however the other type of index system used only in some land record offices, the tract index system (i.e. documents organized along parcels), makes the use a lot easier.[17] The grantor-grantee index is used over the tract index most commonly in spite of the many mistakes search by names causes and how it multiplies the work needed to clarify a title.

The gap between private title plants and land records is getting wider. Title plants have the incentive to invest in the infrastructure and make the indexes and search options as useful and as flexible as possible. By modernizing their systems they can ensure that the process is less time consuming and that the system operates more profitably. Conversely, there are no such incentives behind the public land records. They do not invest in modernization as all purchasers rely on the data obtained from title plants instead and, might I say, their only remaining function is to give constructive notice, providing a public forum where buyers can make sure that the public get notice of the purchase.

The result of constructive notice is that if a document is placed in the public depositories, no one can refer to the lack of notice because the law provides *„a fiction that a person got notice even though actual notice was not personally delivered to him/her."* - states Black's Law Dictionary. The requirements for documents to provide constructive notice are:

(i) they meet formal requirements for recording;
(ii) without technical defect;
(iii) recorded in the „chain of title";
(iv) properly indexed.[18]

The purposes of land records are: protection of the current owner and protection of the prospective buyer,[19] but they are not without any difficulties; instead they suffer from several disadvantages. The main problem with land records and the recording system in one sentence is that *„not all recorded documents give constructive notice."*[20] Another one is that any documents can be placed for recording at public land records, irrespective of their necessity or appropriateness as clerks do not run a thorough examination regarding the documents' validity or accuracy. As a result some of these documents might be ineffective or inaccurate.[21]

Two main advantages of title plants compared to their public counterparts are that they

[17] op.cit note 2 p 397.
[18] Ibid p 401.
[19] Ibid p 394.
[20] Ibid p 394.
[21] Ibid p 395.

(i) provide fast and reliable access to all relevant information on each property by using tract indexes;
(ii) are constantly updated based on deed registers as well as on all other public registers containing information of interest;[22]
(iii) are cheaper than operating a fully responsible government officials staff to determine the validity of the title.

Title insurance in the real property sale process

Title insurance has become a widely accepted part of a real property sale process. The insurance company's involvement starts when the preliminary contract is done. The examination of title follows the preliminary contract. Title insurers or abstractors (title examiner) conduct the title work. Their work product is the abstract. It states the state of the title to the property. Based on the abstract the company issues the policy or policies. It is advised for the insured to get the policy reviewed by an attorney to make sure that the coverage is conforming.

If the insurer finds the title good enough to be insured then the title is presumably marketable, otherwise the insurer would not take on such a risk, as title insurance is a preventive type of insurance.

The final step of a sale is closing. The parties, their representative lawyers, representative of the title insurance company and the lawyer of the lender are all present.

(i) First, the title insurer makes a declaration to the bank that there are no obstacles left (e.g. liens, encumbrances).
(ii) Second the title insurer requests the bank to write the check for the amount of the mortgage.
(iii) Closing is done by the issuance of the check.

Buyers must place a copy of the sale document in land records or record depositories.

Steps of the issuance of a title insurance policy[23]

The abstractor examines the records and summarizes the results in an abstract. The search starts in the title plant maintained by the insurer. It is a relatively easy process if the plant is consequently updated and contains all the latest information regarding the property. It is very important that the search covers all the documents that can affect the state of the title. Insurers exclude risks from the coverage that cannot be discovered by searching through public records.

The question might arise: what is title insurance for if it does not cover those risks?

The answer is to be found in the lack of reliable state records. The critique is seemingly appropriate, as the coverage includes only the risks that have been eliminated by the search, excluding the remaining problems. However, the insurance provides the insured with legal defense against any claims relating to the title included in the coverage, which can consume

[22] Op.cit note 11 p 4.
[23] See op.cit note 11 p 5.

great amount of money in the U.S., where litigation is highly time and money consuming. The other advantage of having title insurance is that the insurer indemnifies the insured against any loss resulting from a title defect covered. As we will see later, title insurance is very different from a general insurance as it is rather a preventive type of insurance.

Despite the seemingly unnecessary protection that title insurance provides, there is another very important function of it. It is oriented around the liability of the examiner, who conducts the search of the title to the property. Thanks to Muirhead v. Watson, the liability of them became so loose despite the importance and the possibly great consequences of their work and work product that it was essential to find a way to protect the buyers against any errors and emissions done by the examiners. The other very positive effect of title insurance is that it protects the policyholder from the exposure to costly litigation if a claim arises against which the policy provides coverage.

The insurer issues a Preliminary Title Report (PTR) also known as Title Commitment and Commitment, which is a quasi offer to issue the policy. It lists all the defects and encumbrances and contains the name of the owner and whether the insurer is willing to insure the title and if yes, on what conditions.

If the search reveals any defects, two ways are possible, either to cure them or exclude them from the coverage by placing them in Schedule B of the policy.

The insurer issues the policy. They distribute the policies either directly or through affiliated or through nonaffiliated agents.

It is important to see that conveyancing and insurance go hand in hand. Title companies profit more from conveyance fees/service charges than from premium incomes.[24] Premiums do not include the costs of conveyance and they are separate from the costs of search, from closing services and from the document preparation.[25]

Costs of title insurances

The consideration for title insurance is a single fee that is payable at the issuance of the policy, however, the insurance lasts as long as the interest in the property insured (including the heirs of the insured). There is no law requiring the seller to notify the title insurance company about the sale of the insured property so the company does not even know when the coverage expires.[26] The coverage only expires when the property changes owner, through succession it continues to cover the heirs.

Usually either the seller or the buyer pays for the owner's policy and in all cases the buyer pays for the lender's policy. The lender does not pay for anything, only requires the insurance as a prerequisite to the loan.

[24] Op.cit note 10 p 16.
[25] Op.cit note 1 p 9.
[26] Nyce, Charles and Boyer, M. Martin 1998. An *Analysis of the Title Insurance Industry[a].* (Journal of Insurance Regulation; Winter98, Vol. 17 Issue 2., p. 213., p. 43. 5 graphs, database: Business Source Premier http://web.ebscohost.com/ehost/detail?vid=2&hid=107&sid=8575676c-eb3e-44fd-ad13-c4d7a105d256%40sessionmgr114&bdata=JnNpdGU9ZWhvc3QtbGl2ZQ%3d%3d#db=buh&AN=1555004 (accessed February 22, 2010)

Regulation

The United States Supreme Court ruled title insurance as affecting interstate commerce in 1944[27] (Roberts 1963). However, federal regulation is still pending. The regulation of the industry is mainly ensured at state level. State commissioners are responsible for it. There are states where premiums are set by the state and must be applied by all insurers, while in other states they set their prices in free competition.

As mentioned above, conveyancing and insurance go hand in hand. Fee-splitting and kickbacks were very common between insurers and banks involved in real property sale, thus the costs of a property transfer were unduly high until the federal regulation in 2008, called the Real Estate Settlements Procedure Act (RESPA), which put an end to these collusions by prohibiting referral fees or charges. (A standardized 3 page long Good Faith Estimate is required to be provided by all lenders within 3 days of the lender receiving a loan application. It helps comparison shopping and shop around. The form explicitly informs the lender that they do not have to choose the insurer suggested by their loaner.)

Comparison between title insurance and property insurance

Title insurance is not to be mistaken for general property insurance because:

(i) Title insurance is a preventive type of insurance; its goal is to eliminate each and every future risks in the title. The aim of title search is to find and locate every risks and defects and if possible to cure them. If a defect is impossible to cure, it will most likely be excluded from the risks covered. Title insurance basically gives coverage only to risks that are discoverable but remain undiscovered despite the search (~insurance against nothing). Whereas general property insurance is exposed to uncertain, future risks and so designed to pay off later losses.[28]
(ii) Premium payable for title insurance is a single payment, contrary to the monthly or annual renewal fees payable for general property insurance.
(iii) The length of coverage title insurance gives corresponds to ownership, and lasts as long as the owner has title to the land including his heirs or until the mortgage is paid off. In contrast, the coverage that general property insurance provides lasts as long as the renewal is done.
(iv) Only a small percentage of premiums go back to the policyholder, most of the expense is spent on prevention: title search and the maintenance of title plants contrary to general property insurance where most of the premium is spent on compensation.

III. Relation between title insurance and adverse possession

Now I would like to highlight the connection between title insurance and adverse possession, an involuntary alienation. To begin with, we shall examine four questions:

[27] Op.cit note 10 p. 14
[28] Les Christie, *Title insurance: Getting ripped off?* http://money.cnn.com/2006/01/11/real_estate/title insurance_exposed/index.htm (accessed: March 8, 2010)

i. first we have to research the risks companies are willing to cover;
ii. the second aspect to consider with regard to the relation between title insurance and adverse possession is the overlapping time period;
iii. the third question to take into account is procedural, namely, how the title obtained through adverse possession enters the public records;
iv. the last aspect that necessitates some investigation is the effect „Marketable Title Acts" have on title insurance, and so, on adverse possession.

Risks companies are willing to cover

Companies conduct a title search to form a basis for deciding whether the title is clear enough to undertake the insurance of the title to property. The search of title is based on the examination of public records. If the title is found clear or the minor defects have been cured, they issue the policy but they only undertake risks discoverable from the public records. Claims that are not discoverable from the records will most likely be excluded like adverse possession (it does not leave a mark on records). An exception is if the title to the land obtained by adverse possession enters the public records, but that is the object of a following matter and will be discussed below.

The overlapping time period

Adverse possession is a method of obtaining title to a land by possession. The period required for adverse possession varies across states but state laws normally require 5-20 years. The possession must be actual, continuous, exclusive, hostile or adverse, open and notorious. Although there are two types of adverse possession, short and long term, as only long-term adverse possession operates as an additional title assurance method we narrow our focus on that.[29]

The adverse possessor might obtain ownership or easement rights. For the discussion of the matter at hand it is important to include prescriptive easements as well in the examination among adverse possession. Prescriptive easement is a type of easement that is established by continuous use without the permission of the owner for a period of time set by state law.

Prescriptive easement is a method to obtain right to use another's land by use for purposes like e.g. right of way. It can be obtained in a very similar way to adverse possession. Resulting from its nature only positive, affirmative easements can be acquired by prescription, no negative easements, such as refrainment. The use must be open and notorious, adverse and under a claim of right, continuous and uninterrupted for the statutory period.

The statutory period required for prescriptive easement is equal to the period for adverse possession.[30]

Let us consider the following hypothetical from two angles: There is a property against which there has not been a claim for cca. 20 years and then a claim arises. (The two following scenarios are applicable to prescriptive easements as well because they affect title as well.)

[29] Short-term adverse possession is basically the same as long-term with the difference of the term required (five to seven years) and that the short-term adverse possessor pays the property taxes before the legal owner or bases his claim on a document. In: op.cit note 8 p 961.
[30] Op.cit note 2 pp 521–524.

a) In the first scenario the owner has his property covered by title insurance.

Let us presume that such a claim arises that is not included in the coverage as standard policies tend to exclude the defense of a claim related to adverse possession. It is possible to pay extra premium for extra coverage that includes such claims. For the sake of our inquiry, let us set aside the extra coverage option. It is obvious that having no coverage against the claim the poor owner has to bear the costs of litigation. It is a negative consequence but the question is:

Can the owner plead adverse possession in defense of his title?

In order to answer the question we have to look at the basic requirements of adverse possession, which must be

(i) actual,
(ii) continuous,
(iii) exclusive,
(iv) hostile or adverse,
(v) open and
(vi) notorious.

If the above requirements are met by the adverse possessor, he obtains title to the land in his actual possession; his title will not prevail over the original owner's title, who had title to a greater part of the property.

It is worth noting that, contrary to the above, if the adverse possessor is not able to meet all the above requirements, but has color of title, a written document or a deed that is purported to transfer title but can be legally defective, however, it appears to be valid, he must prove only two out of the six requirements, namely that the possession was actual and continuous. In addition, in such a case the adverse possessor obtains title to the entire land, even though he possessed only a smaller part of it.

Back to the scenario in question, the possession was let us say actual, continuous, exclusive, open and notorious, these are most likely met by a true owner, but to decide about *hostile or adverse* we come across some obstacles. If the state follows the *„objective test"* in determining hostility, the adverse possessor must use it *„without the permission from the true owner"*[31] than we cannot say that the true owner would use the property without his own permission, it would be impossible. It is also impossible to justify the owner's adverse possessory claim applying the *„intentional trespass test"*, where the *„adverse possessor must*

(i) *know that he does not actually own the land and*
(ii) *subjectively intend to take title from the true owner."*[32]

On the other hand if the state follows the *„good faith test"*, the owner (in this case considered as) *„adverse possessor must believe in good faith that he owns title to the*

[31] Op.cit note 3 p 442.
[32] Ibid p 443.

land".[33] It seems possible for the true owner to defend his title by adverse possession, applying the good faith test.

b) In the second scenario the owner also has his property covered by title insurance.

Let us presume that an adverse possessory claim arises. The question is whether the policy provides protection against such a claim. Standard policies exclude the possibility to either bring an adverse possessory claim on the policyholder's behalf or to defend one. In this case the owner is left without any financial help or help in litigation, thus, he is like an open target to those claims. On the other hand, if he sacrifices some more money and purchases extended coverage and insures the property against additional risks including adverse possession, he will be exposed neither to the costs of litigation nor to any loss without getting indemnification.

How title obtained through adverse possession enters public records

It is an important issue because it determines whether the title to the property can become insurable again. Claims of parties in possession are normally excluded from the coverage as previously mentioned. A layperson, however, would think that title insurance is especially designed to prevent such encumbrances as adverse possession.

What if someone has acquired a property through adverse possession but has not registered it yet? If his claim is against an owner on record whose title is insured then we are back to scenario two detailed earlier. If the claim is against someone with no insurance, that is a different situation, the discussion of which is not our objective now.

The most interesting question is:

How can the adverse possessor, who wants to be protected against latent defects, insure his title having met all the requirements for prescription of ownership?

In order to answer the question above the procedural aspects of adverse possession must be clarified. In order to do that, we have to have a closer look at the situation when the statutory period for adverse possession has lapsed and the ownership becomes disputed.

a) The owner on record files a suit to eject the adverse possessor.

As adverse possession is considered a quasi Statute of Limitations, the owner on record cannot bring suit to recover possession from a wrongful occupant after the time period set in the Statute of Limitations has lapsed. Thus, under this circumstance the owner on record is likely to lose the property even if he had title insurance. We are basically back to 'scenario two' from the previous point. If the policy includes extra coverage he will be entitled to the defense of the claim or indemnification.

b) The owner does not sue.

[33] Ibid p 443.

A practical problem arises, namely, that there is no record of ownership of the party claiming adverse possession. He needs to record either a judgment or a deed vesting title to the property in him so confirming his ownership. He either files *„a quiet title action"* against the owner on record or demand that the owner *„execute a quitclaim deed"* in favor of him.[34]

As it is an acquisition of title outside the land registry system, a successful adverse possessor, after the statutory period lapsed, has to make his title appear in the public records as we said. A prerequisite to the purchase of title insurance is this registry of the title in the public records.

„The title agent must verify the statutory basis of the action and the validity of the judicial proceedings (jurisdiction, necessary party-defendants, service, any term or provision of the decree or judgment, no right to appeal, and no right to review)"[35]

Once the title enters the records the owner qualifies for title insurance. If this requirement cannot be met, marketable title acts can act as a 'safety net' in order to get title insurance.

The effect of Marketable Title Acts on title insurance and on adverse possession

It is worth examining whether they can be any complement to title insurance or what the relation is between adverse possession and the legal consequence of marketable title acts.

As the Prefatory Note of the Uniform Marketable Title Act defines it:

„The basic idea of the Marketable Title Act is to codify the venerable New England tradition of conducting title searches back not to the original creation of title, but for a reasonable period only. The Model Act is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that he need search no further back in the record."

„If an owner has a clear record chain of title back to a root of title (that is, a deed or similar document that created or transferred title) for a specific period (commonly 20 to 40 years) then title is free from all rights or interests that were recorded before a root of title."[36]

If the adverse possessor does not have other ways to qualify for title insurance meaning he cannot establish his title on public records in the traditional way, he can try to conform to the marketable title act in such state where there is such an act in force. If he can establish a root of title, a deed or document that created or transferred title, then he does not have to search back further in the records. Thus, if the adverse possessor does meet the requirements of the marketable title act and can present a root of title he will not have to prove anything beyond that. (As title is free from all rights or interests that were recorded before a root of title.)

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[34] Ibid p 447.

[35] Underwriting manual on adverse possession at: http://www.vuwriter.com/vumanuals.jsp?displaykey=UM00000284 (accessed: March 8, 2010)

[36] op.cit note 2 p 409

IV. Conclusion

Title insurance and adverse possession seem to be very different topics, not having much in common, except that they are both pertinent to property law. The goal of my thesis/research was to make the reader familiar with title insurance first, in order to give a basis for the following inquiry aimed at finding the cross section between the two; to discover all, if any, possible interfaces they have; how they relate to each other; what consequences they have on the other; by analyzing the correlation, drawing up the possible scenarios and drawing conclusions to each possible scenario. The intention was to depict the whole network of interconnections possible between title insurance and adverse possession and arrange the results so as to form a system by which it becomes easier to think through the possible scenarios.

The idea behind my hypothesis seems to be confirmed. It is worth examining the relation between title insurance and adverse possession and drawing conclusions, as it is possible to give answers to hypothetical questions along the already well-established principles of adverse possession and the rules governing title insurance as well. There are more interfaces between the two, such as the risks covered by a title insurance policy, or the overlapping time period between them; moreover, there is the interesting question of how a title acquired by adverse possession enters the public records and the effects marketable title acts have on adverse possession and title insurance.

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A TULAJDONVÉDELMI BIZTOSÍTÁS ÉS AZ ELBIRTOKLÁS ÖSSZEFÜGGÉSEI

(Összefoglaló)

A tanulmány az alapvetően amerikai jogintézmény, a tulajdonvédelmi biztosítás, vagy más néven jogcím biztosítás[37] (*title insurance*) és az elbirtoklás (*adverse possession*) közötti lehetséges összefüggéseket tárja fel és ad válaszokat a felvetődő kérdésekre.

A tulajdonvédelmi biztosítás egy biztosítási forma, amely az amerikai ingatlan-nyilvántartás hiányosságait hivatott orvosolni. Egy olyan biztosítás, amelyben a biztosító az ingatlan jogcímének a kötvény kibocsátáskor meglévő látens hiányosságai-val, hibáival szemben biztosítja a biztosított személyt, lehet az a tulajdonos, vagy hitelből finanszírozott ingatlan esetén maga a hitelező. Kialakulásának oka elsősorban a közhiteles ingatlan-nyilvántartás hiányában keresendő, valamint egy pennsylvaniai legfelsőbb bírósági döntés-nek köszönhető, amely rávilágított arra, hogy az ingatlan vevője védtelen maradt az ingat-lan átruházásában közreműködő, a tulajdonjog jogi státuszának tisztázásával megbízott sze-mélyek mulasztásával szemben..

[37] A kifejezésnek egyértelmű, általánosan elfogadott magyar fordítása még nincs, egyes szerzők tulajdonvédelmi biztosításként nevezik, míg mások a jogcím biztosítás elnevezést részesítik előnyben. Mivel a magyar jogrendszerben más feladatokat hivatott adott esetben ellátni, a fordítás attól függően is változhat, hogy mely funkcióját tekintjük elsődlegesnek.

A jogintézmény fejlődése mögötti okok kifejtésével, fő jellemzői bemutatásán át, egy történeti aspektusból kiindulva, általános definícióalkotásra teszek kísérletet, valamint bemutatom a biztosítás ezen formájában érintett személyeket, megismertetem az olvasót a kötvények alapjellemzőivel, költségeivel, valamint a biztosító társaságok által fenntartott, az állami ingatlan-nyilvántartásokat quasi kiváltó irattárakkal (*title plants*).

A tanulmány második részében a jogcímbiztosítás és az elbirtoklás közötti lehetséges összefüggéseket veszem górcső alá. Először a biztosítással fedezett biztosí-tási események elbirtoklásra gyakorolt hatását vizsgálom, és fordítva, majd az elbirtok-lási idő és a jogcímbiztosítás által egyszerre lefedett időt, harmadikként megnézem, hogy az elbirtoklás-sal szerzett jogcím milyen módon kerül az állami nyilvántartásokba, végezetül pedig az ún. „piacképes jogcím törvények" (*marketable title acts*) jogcím-biztosításra és elbirtoklásra gyakorolt hatását, valamint azokat kiegészítő mivoltát vizsgálom.